No. 70

In the Supreme Court of the United States

OCTOBER TERM, 1967

ALITALIA-LINEE AEREE ITALIANE, S.P.A., PETITIONER

v.

JOHN LEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of May 15, 1967, inviting the Solicitor General to express the views of the United States.

This case stems from suits instituted in the United States District Court for the Southern District of New York for wrongful death, personal injury, and property damage against petitioner, an Italian airline corporation (Alitalia). The injuries were suffered by American passengers aboard an Alitalia plane which crashed on February 26, 1960, at Shannon, Ireland, *en route* from Rome to New York. The parties agree that the flight in question constituted "international transportation" within the meaning of Article

1(1) and (2) of the Warsaw Convention[1] and was therefore subject to its terms. The issue is whether Alitalia is entitled to invoke that provision of the Convention (Article 22, *infra*, pp. 12–13) which permits an international air carrier to limit its liability for death or personal injury to $8,290.00 per passenger (the limit in effect at the time of the crash under that Article[2]), and to other stated sums for loss of personal property and baggage.

Alitalia supplied each passenger involved in this suit with tickets and baggage checks, the former at least one day prior to the flight. The following statement, both in English and in Italian, appears in small type on the cover of each ticket booklet:[3] "Each passenger should carefully examine this ticket, particularly the Conditions on page 4" (App. 47). On page four of the ticket, captioned "CONDITIONS OF CONTRACT," are set forth eleven separate con-

[1] Formally titled, "Convention for the Unification of Certain Rules Relating to International Transportation by Air," but commonly referred to by the name of the city in which it was concluded on October 12, 1929. It was adhered to by the United States in 1934, 49 Stat. 3000; T.S. No. 876. The relevant portions of the Convention are set forth in Appendix A to this memorandum, *infra*, pp. 11–13.

[2] On May 13, 1966, by Special Agreement between foreign and domestic air carriers, the limit of international air carrier liability for passenger death or injury was raised to $75,000 per person on transportation to, from, or with an agreed stopping place in the United States. C.A.B. Agreement No. 18,900 (Order Serial No. E.-23680), 31 F.R. 7302, 3 CCH Aviation Law Rep. ¶ 27,130.

[3] Relevant portions of a representative Alitalia passenger ticket are reproduced in approximately actual size at pages 45–57 of the separately bound appendix (hereinafter "App.") to the petition for certiorari, which petitioner has filed with the Clerk pursuant to Rule 23.

ditions in small type, number 2(a) of which recites (App. 49):

> Carriage hereunder is subject to the rules and limitations relating to liability established by the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw, October 12, 1929 * * *.[4]

On respondents' motion for partial summary judgment, the district court struck petitioner's invocation of the limitation-of-liability provisions of the Convention as partial affirmative defenses to respondents' suits. *Lisi* v. *Alitalia-Linee Aeree Italiane,* 253 F. Supp. 237 (S.D. N.Y.) (App. 43). The court ruled that by printing the required warnings about limitation of liability on its passenger tickets and baggage checks in type so small as to be "virtually invisible," and by inserting those warnings in a context which

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[4] In none of the conditions is the limit on recovery in the event of death or personal injury specified in a monetary amount in any national currency, although number 4(d) of the Conditions specifies that recovery for damages to, or loss of baggage—

> * * * is limited to 250 French gold francs (consisting of 65½ milligrams of gold with fineness of nine hundred thousandths) or its equivalent per kilogram in the case of checked baggage, and 5000 such French gold francs or its equivalent per passenger in the case of unchecked baggage or other property * * *.

This unit of gold franc measure is the so-called "Poincare" franc, fifteen of which equals approximately one dollar in United States currency.

"artfully camouflaged" them,[5] Alitalia had, as a matter of law, failed to meet the requirements of Articles 3 and 4 of the Convention (see pp. 5–8, *infra*), and that it therefore was not entitled to invoke the liability limitation provisions of the Convention.[6]

On petitioner's appeal from that interlocutory decision (authorized under 28 U.S.C. 1292(b)), the Second Circuit affirmed by a divided vote. *Lisi* v. *Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F. 2d 508. The majority stated that petitioner had not met the Warsaw Convention's prerequisites because "the required statement on the ticket [regarding limitations of liability under the Convention] 'was printed in such a manner as to virtually be unnoticeable and unreadable'" (App. 22). Petitioner's application for rehearing *en banc* was denied, three judges dissenting (App. 39), and Alitalia has petitioned for certiorari.

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[5] The district court characterized the ticket as follows (App. 52):

"The footnotes printed in microscopic type at the bottom of the outside front cover and coupons, as well as condition 2(a) camouflaged in Lilliputian print in a thicket of 'Conditions of Contract' crowded on page 4, are both unnoticeable and unreadable. Indeed, the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that they are so artfully camouflaged that their presence is concealed."

[6] The district court rejected respondents' additional contentions challenging the adequacy of the language in which the limitation warning had been expressed on the Alitalia tickets, ruling that (App. 52, n. 7): "If the statements were noticeable and readable, the passenger would have been sufficiently alerted * * *." See also note 9, *Infra.*

For the reasons outlined below, we do not urge further review.

1. Article 3(1) of the Warsaw Convention (49 Stat. 3015) provides:

> For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
>
> * * * * *
>
> (e) A statement that the transportation is subject to the rules relating to liability established by this convention.

Article 3(2) further provides (*ibid.*):

> The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall nonetheless be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

Similarly, Article 4[7] requires an international air carrier to issue a baggage check containing a statement that transportation is subject to the limitation provisions of the Convention; otherwise, the carrier is not entitled to limit its liability for the loss of personal property.

The circuits agree that the purpose of Articles 3 and 4 is to "afford [the passenger] a reasonable opportunity to take measures to protect himself against the limitation of liability." *Mertens* v. *Flying Tiger Line, Inc.*, 341 F. 2d 851, 856 (C.A. 2), certiorari

[7] Set out *infra*, pp. 11–12.

denied, 382 U.S. 816; *Warren* v. *Flying Tiger Line, Inc.*, 352 F. 2d 494, 497 (C.A. 9); *Seth* v. *British Overseas Airways Corp.*, 329 F. 2d 302, 307 (C.A. 1), certiorari denied, 379 U.S. 858. Thus, it has been held that an airline which delivers to its passengers a ticket containing the required warning at a time too late for them to obtain other financial protection, *e.g.*, at the ramp immediately prior to embarkation (*Warren*), or after the plane is airborne (*Mertens*), has not complied with Article 3 and therefore may not avail itself of the Convention's provisions regarding limitation of liability.[8] The holding of the courts below—that in order to be able to invoke those provisions for limited liability an airline must not only make timely delivery of the ticket, but also provide on it the required warning in readable fashion—is consistent with these decisions and with domestic precedent on the necessity of adequate notice.[9] It also represents, in our-

[8] *Seth* v. *British Overseas Airways Corp.*, *supra*, involving a claim for loss of baggage, was decided favorably to the airline principally on the ground that the baggage ticket gave the passenger "clear notice" and "fair warning of the existence of limitations on the carrier's liability * * *." 329 F. 2d at 307. In any event, no question was there raised as to the readability of the notice, the litigated issue being whether the use of a conditional clause—unless carriage is not international—vitiated the required statement that the carriage was subject to the Convention. The court held it did not. *Seth*, therefore, is not in conflict with the decision below.

[9] See, *e.g.*, *Klar* v. *H. & M. Parcel Room, Inc.*, 270 App. Div. 538, 61 N.Y.S. 2d 285, affirmed, 296 N.Y. 1044, 73 N.E. 2d 912.

Petitioner's assertion to the contrary notwithstanding (*e.g.*, Pet. 6), the decision below is not properly characterized as holding that "actual notice" to the passenger must be shown before the Convention's limitations may be invoked. See App. 20–21, 46–47; Brief for the Respondents in Opposition, p. 6.

view, a proper performance of the judicial duty of the courts of contracting states to implement the broad provisions of the Convention.

Petitioner points out that Article 4, which relates to baggage, expressly provides that if a baggage check does not contain the required "particulars"—including a statement that liability under the Convention is limited—a carrier is not entitled to avail itself of the limitations provided for in the Convention. Relying upon the absence of such an express provision in Article 3, petitioner argues that a carrier is only estopped from raising the limitation defense in a suit for damages for personal injury or death of a passenger when it fails to deliver a ticket altogether, as provided in Article 3. *A fortiori,* petitioner says, it should have been allowed to assert the Convention limits of liability here since it supplied a ticket bearing a notice, albeit one in unreadable form.

To be sure, support for petitioner's position can be derived from a literal reading of the Convention. But, as the court below noted (App. 18), that literalism would deprive Article 3(1) of purpose and meaning; an inflexible literal approach—or reliance upon the maxim *expressio unius est exclusio alterius* (see App. 17)—is therefore inappropriate. In rejecting strict literalism and in interpreting Articles 3 and 4 to require notice in readable form, the courts below adhered to the approach consistently applied in interpreting the Convention. See *Mertens* v. *Flying Tiger Line, Inc., supra,* 341 F. 2d at 856–857, 858; *Warren* v. *Flying Tiger Line, Inc., supra,* 352 F. 2d

at 497–498; *Eck* v. *United Arab Airlines, Inc.*, 360 F. 2d 804, 812 (C.A. 2); *Eck* v. *United Arab Airlines, Inc.*, 15 N.Y. 2d 53, 58–59, 255 N.Y.S. 2d 249, 251.[10]

Petitioner's contention that the Civil Aeronautics Board "expressly approved the form and content" (Pet. Reply Br., p. 3) of the airline passenger ticket which it used is misleading. The Board did not purport to pass on, much less decide, the size of type, type face, or other typographic details the airlines should employ in printing the required warning regarding limited liability. Rather, the Board merely approved an intercarrier agreement on the form of the ticket as not adverse to the public interest, since the agreed-upon form constituted a "substantial improvement"[11] over the one previously in use. Moreover, the Board has not merely criticized the inadequacy of the print size used by the airlines; it has taken affirmative steps and made mandatory that car-

[10] While language supporting petitioner's reading of the Convention may be found in *Grey* v. *American Airlines*, 95 F. Supp. 756, 758 (S.D. N.Y.) (see Pet. 9–10), we point out that the only issue as to the notice there in question was whether all the "agreed stopping places" were set forth on the ticket as Article 3(1)(c) of the Convention requires, not whether the required warning as to limitation of liability had been given. In affirming, the Second Circuit noted that the contention as to the omission of the stopping places was "technical and wholly unsubstantial" (227 F. 2d 282, 284, certiorari denied, 350 U.S. 989), which serves to distinguish this case. See App. 21, n. 8.

[11] *Pan American World Airways, Inc.*, 24 C.A.B. 575, 576. Indeed, the print on the airline ticket here (see App. 49–51) is far smaller than that used in the report of the Board upon which petitioner relies. See 24 C.A.B. 575, 579.

riers give international passengers additional notice—in larger type—regarding limits of liability under the Warsaw Convention. See the Board's ruling at 28 F.R. 11775–11777 (Nov. 5, 1963), and 14 C.F.R. 221.175.

2. In addition, the decision below is of little prospective importance. By Special Agreement approved on May 13, 1966 (see note 2, *supra*), the airlines (including Alitalia) raised the upper limits of liability to each passenger for death and personal injury to $75,000, and obligated themselves to provide additional "*notice in 10 point type*[12] advising international passengers of the limitations of liability" under the Warsaw Convention and that Special Agreement (emphasis added). 31 F.R. 7302 (May 19, 1966); 14 C.F.R. 221.175 (January 1, 1967 Rev.). The inclusion of that new notice (see Appendix B, *infra*, p. 14) would remedy the inadequacy in notice found by the courts below.[13]

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[12] The footnotes in this brief are printed in 10 point type.

[13] Compare the notice at App. 48–49 (or in Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 513) with that at Appendix B, *infra*, p. 14 (also reproduced at 80 Harv. L. Rev. 598). See also Mendelsohn, *Another View on the Adequate Award in International Aviation Accidents*, Insurance Law Journal, April 1967, p. 197, at 203–207.

CONCLUSION

For the reasons stated, the United States does not urge further review.

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JUNE 1967.

APPENDIX A

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, the Warsaw Convention, 49 Stat. 3000, *et seq.*, provides in pertinent part:

Article 3:

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

Article 4:

(1) For the transportation of baggage, other than small personal objects of which the pas-

senger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The name and address of the carrier or carriers;

(d) The number of the passenger ticket;

(e) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(f) The number and weight of the packages;

(g) The amount of the value declared in accordance with article 22(2);

(h) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d), (f), and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

* * * * *

Article 22:

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall

not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

APPENDIX B

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the convention and special contracts of carriage embodied in applicable tariffs provide that the liability of British Overseas Airways Corporation and certain other carriers parties to such special contracts, for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US Dollars 75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US Dollars 8,290 or US Dollars 16,580.

The names of carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative.

NOTE

The limit of liability of Seventy Five Thousand United States Dollars above is inclusive of Legal Fees and Costs except that in case of a claim brought in a State where provision is made for separate award of Legal Fees and Costs, the limit shall be the sum of Fifty Eight Thousand United States Dollars exclusive of Legal Fees and Costs.

U.S. GOVERNMENT PRINTING OFFICE: 1967